

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

David Booker,

Case No.: 2:23-cv-01566-GMN-DJA

Petitioner,

Order

v.

Brian Williams, et al.,

Respondents.

Pro se Petitioner David Booker filed this 28 U.S.C. § 2254 petition for writ of habeas corpus challenging his state conviction. ECF No. 1-1. Also before the Court is Booker's Motion for Recusal of Judge (ECF No. 3) and Motion Requesting Investigation (ECF No. 5). On initial review under the Habeas Rules,¹ the Court finds that Booker's claims are unexhausted in state court. The Court dismisses the petition without prejudice and denies his motions as moot.

I. Background²

Booker pled guilty to one count of attempt battery with substantial bodily harm. *See State of Nevada v. Booker*, Case No. C-22-369275-1. The state court entered the judgment of conviction in January 2023. Booker's direct appeal remains pending before the appellate court. Booker filed a state post-conviction habeas petition in May 2023 that the state court denied in July 2023. *See Booker v. State of Nevada*, Case No. A-23-871112-W. It does not appear that

¹ All references to a "Habeas Rule" or the "Habeas Rules" in this order identify the Rules Governing Section 2254 Cases in the United States District Courts.

² The procedural history in this section is derived from Booker's allegations as well as his criminal matters in the Eighth Judicial District Court for Clark County. The Court takes judicial notice of the online docket records of the state district court and Nevada appellate courts, which may be accessed by the public online at:

<https://www.clarkcountycourts.us/Anonymous/default.aspx> and at: <http://caseinfo.nvsupremecourt.us/public/caseSearch.do>.

1 Booker has appealed the denial of his state habeas petition. Booker, however, filed another state
2 habeas petition in October 2023 that remains pending before the state district court. *See Booker*
3 *v. High Desert State Prison*, Case No. A-23-878801-W.

4 **II. Discussion**

5 **a. Booker failed to file an IFP application and failed to pay the filing fee.**

6 As an initial matter, the Court notes that Booker has not properly commenced this habeas
7 action by either paying the standard \$5.00 filing fee or filing an application for leave to proceed
8 *in forma pauperis* (“IFP”).

9 Pursuant to 28 U.S.C. § 1914(a) and the Judicial Conference Schedule of Fees, a \$5.00
10 filing fee is required to initiate a habeas action in a federal district court. The Court may
11 authorize an indigent prisoner to begin a habeas action without paying the \$5 fee if he or she
12 submits an IFP application on the approved form and includes three specific documents: (a) the
13 prisoner’s financial declaration and acknowledgement showing an inability to prepay fees and
14 costs, (b) a financial certificate signed by the prisoner and an authorized prison official, and (c) a
15 copy of the prisoner’s account statement for the six-month period prior to filing. 28 U.S.C.
16 § 1915(a); LSR 1-1, LSR 1-2.

17 **b. Booker’s petition is dismissed without prejudice as unexhausted.**

18 Habeas Rule 4 requires federal district courts to examine a habeas petition and order a
19 response unless it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v.*
20 *Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019). This rule allows courts to screen and dismiss
21 petitions that are patently frivolous, vague, conclusory, palpably incredible, false, or plagued by
22 procedural defects. *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990) (collecting cases);
23 *Boyd v. Thompson*, 147 F.3d 1124, 1128 (9th Cir. 1998).

1 Because a federal habeas petitioner incarcerated by a state must give state courts a fair
2 opportunity to act on each of his claims before he presents them in a federal habeas petition,
3 federal courts will not consider his petition for habeas relief until he has properly exhausted his
4 available state remedies for all claims raised. *Arevalo v. Hennessy*, 882 F.3d 763, 764–67 (9th
5 Cir. 2018).

6 A claim remains unexhausted until the petitioner has raised the claim through one
7 complete round of either direct appeal or collateral proceedings to the highest state court level of
8 review available. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999); *Peterson v. Lampert*,
9 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). To properly exhaust state remedies, a petitioner
10 must “present the state courts with the same claim he urges upon the federal court.” *Picard v.*
11 *Connor*, 404 U.S. 270, 278 (1971). A claim is not exhausted unless the petitioner has presented
12 to the state court the same operative facts and legal theory upon which his federal claim is based.
13 *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). The claim “must include reference to a
14 specific federal constitutional guarantee, as well as a statement of the facts that entitle the
15 petitioner to relief.” *Gray v. Netherland*, 518 U.S. 152, 162–63 (1996)). *See also Castillo v.*
16 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005).

17 Booker has not properly and fully exhausted his state court remedies because he has not
18 presented the claims alleged in his federal habeas petition through one complete round of either
19 direct appeal or collateral proceedings to the Nevada appellate court. Booker may file a new
20 federal habeas petition—in a new case case—upon exhaustion of his state court remedies.
21 Dismissal of this action as unexhausted without prejudice will not materially impact the analysis
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1 of any issue in a later-filed habeas proceeding or otherwise result in substantial prejudice.³ The
 2 Court dismisses Booker's petition without prejudice as unexhausted.

3 **c. Booker's motions are denied.**

4 Booker has filed a motion for recusal of Magistrate Judge Albregts. ECF No. 3. The
 5 motion is without merit, and the Court denies it. The basis of the motion is that when Booker
 6 filed an IFP application and "said the \$402 filing fee was like a slave having to pay for their
 7 freedom" Magistrate Judge Albregts allegedly referred to the filing fee as a "slave's fee."
 8 However, Booker did not provide a reference for his allegation, nor is the alleged communication
 9 readily discernible from the docket filings in this case. Booker also did not refer to a different
 10 case number nor provide a meritorious reason for recusal. In addition, Booker had filed a motion
 11 requesting investigation (ECF No. 5), which the Court denies as moot.

12 **III. Conclusion**

13 IT IS THEREFORE ORDERED that Booker's Petition for Writ of Habeas Corpus (ECF
 14 Nos. 1-1, 4) is **DISMISSED without prejudice**.

15 It is further ordered that Booker's Motion for Recusal (ECF No. 3) and Motion
 16 Requesting Investigation (ECF No. 5) are **DENIED**.

17 It is further ordered that a certificate of appealability is denied as reasonable jurists would
 18 not find the Court's conclusion to be debatable or wrong.

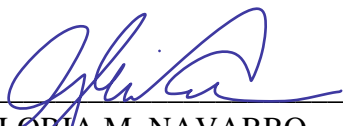
19 It is further ordered that the Clerk of the Court is directed to direct informal electronic
 20 service upon respondents under Rule 4 of the Rules Governing Section 2254 Cases by adding
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22 ³ Booker has filed three § 2254 petitions for writ of habeas corpus in this court that were
 23 dismissed for similar reasons. *See Booker v. Lombardo*, Case No. 2:22-cv-2033-JAD-DJA;
Booker v. Clark County Detention Center, Case No. 2:22-cv-2077-CDS-BNW; *Booker v. State*
of Nevada, Case No. 2:23-cv-00526-JAD-NJK.

1 Nevada Attorney General Aaron D. Ford as counsel for respondents and to provide respondents
2 an electronic copy of all items previously filed in this case by regenerating the Notice of
3 Electronic Filing to the office of the AG only. No response is required from respondents other
4 than to respond to any orders of a reviewing court.

5 It is further ordered that the Clerk of the Court is directed to enter final judgment
6 dismissing this action and close this case.

7 DATED: **October 25, 2023**

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10 GLORIA M. NAVARRO
11 UNITED STATES DISTRICT JUDGE
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